SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-994

MYRON EPSTEIN,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Respondent.

On Petition for a Writ of Certiorari to the Appellate Division, First Department, of the Supreme Court of The State of New York

PETITIONER'S REPLY BRIEF

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Respondent's opposition rests primarily on the ground that disciplinary proceedings are civil in nature and that the Fifth Amendment privilege against self-incrimination is limited to criminal proceedings. This position disregards the very recent holding of this Court in *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971), upon which the

petition places principal reliance, following the landmark decision in *Boyd v. United States*, 116 U.S. 616 (1886), that the denomination of a proceeding as civil or criminal is not determinative of the applicability of the Fifth Amendment and that the privilege extends to civil forfeitures.[1]

Respondent does not suggest why forfeiture of the right to practice law for eighteen months is less penal in effect than the forfeiture of a sum of money, as in *U.S. Coin & Currency*, or property, as in *Boyd*, both of which have been held within the scope of the privilege because the sanction was criminal in effect although civil in name. The punishment of suspension from the bar is obviously more severe than forfeiture of money or property. Nor does the opposition respond to petitioner's demonstration that suspension from the practice of law and disqualification from other employment have been held to be criminal punishment for purposes of other constitutional provisions and that the Court should therefore decide whether the punishment of suspension from the practice of law should also be regarded as criminal punishment for purposes of the Fifth Amendment's privilege against self-incrimination.

Respondent opposes certiorari, however, because it would be an "astounding proposition" of law that would permit an attorney who, under threat of contempt, was compelled to provide evidence against himself warranting disciplinary action to continue in the practice of law. It should be noted, preliminarily, that petitioner was not disbarred as unfit to practice law; he was punished for his self-disclosed misconduct by an eighteen month suspension. But, more

[1] Petitioner does not argue that *Spevack v. Klein*, 385 U.S. 511 (1967), as respondent mistakenly asserts, has decided that disciplinary proceedings are within the scope of the privilege. That case, of course, held only that the privilege can be invoked in disciplinary proceedings and that the penalty of disbarment cannot be imposed for asserting the privilege. But whether the Fifth Amendment encompasses disciplinary action as punishment remains an important undecided constitutional question which should be resolved.

importantly, respondent overlooks the fundamental status of the Fifth Amendment privilege in our system of justice. It would obviously be more "astounding" to respondent to set free a person guilty of murder where his conviction was based upon his coerced, albeit entirely credible, confession. But it is the essence of the privilege "that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. * * * Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964). The Court quoted from "the great case of *Boyd v. United States*" the language that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime *or to forfeit his goods*, is within the condemnation" of the Fourth and Fifth Amendments. 378 U.S. at 8. (Emphasis supplied.)

Even before the Fifth Amendment was held applicable to State action in *Malloy v. Hogan*, coerced, self-incriminating testimony was held to violate the due process clause of the Fourteenth Amendment as offensive to "an underlying principle in the enforcement of our criminal law: that our is an accusatorial and not an inquisitorial system." *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). As this Court stated in *Rochin v. California*, 342 U.S. 165, 173 (1952), "Coerced confessions offend the community's sense of fair play and decency." Under our system of justice, "society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillfull investigation." *Watts v. Indiana*, 338 U.S. 49, 54 (1949). With respect to respondent's "astonishment" at the proposition that offenders go unpunished if they are compelled to supply the evidence of their offense, the Court stated in *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960): "As im-

portant as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."

The offense to the community's sense of fair play and decency and the sacrifice of important human values are no less when the punishment of suspension is imposed upon an attorney out of whose own mouth the evidence of his transgressions was wrung.

Respectfully submitted,

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